No. 72-403

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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JEANNE M. MURRAY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

Question Presented

Whether, in an appropriate case, a federal district court has jurisdiction to grant interlocutory relief pending an adjudication by the Civil Service Commission.

Statement

At the close of business on Thursday, May 20, 1971, Respondent, Mrs. Jeanne M. Murray was handed a letter from Mr. W. H. Sanders, then Acting Commissioner of the Public Buildings Service, stating that her employment as a probationary program analyst with the General Services

Administration ("GSA") would be terminated the following Friday for failure to follow office procedures and to accept direction.[1] Mrs. Murray had been given no prior notice, formal or informal, of any charges against her, nor any opportunity to rebut them. Her job performance had, in fact, been rated as satisfactory only the previous month.[2]

The following Tuesday, Mrs. Murray's counsel met with a GSA personnel officer, Mr. Stan Maher, to discuss her termination. They requested specifics on the charges against her and an opportunity to reply. Mr. Maher showed counsel portions of a memorandum setting forth the basis for Mrs. Murray's termination and took the request for a hearing under advisement.[3]

The memorandum set out the basis for the allegations set forth in Mr. Sanders' letter and referred at length to Mrs. Murray's alleged parallel conduct while employed at the Defense Intelligence Agency ("DIA").[4] Mrs. Murray had good reason to believe that her record at DIA was excellent.[5] That afternoon, Mrs. Murray's counsel sent a letter to Mr. Maher calling his attention to 5 C.F.R. 315.805, which prohibits the termination of a probationary employee "based in whole or in part" on prior conduct, without benefit of a statement of charges and "bona fide consideration" of her reply.[6]

The afternoon before her termination was to occur, the GSA informed Mrs. Murray's counsel that she would not

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[1] App., pp. 25-26.

[2] *Id.* at 27.

[3] *Id.* at 7-8.

[4] 8. App.

[5] App. at 6, ¶ 4.

[6] *Id.* at 10-11.

be given a hearing and could not have a copy of the adverse memorandum. Counsel immediately telephoned the Civil Service Commission to determine whether Mrs. Murray's appeal could be expedited in view of her imminent termination. They were informed that the Commission's case load would not permit such a procedure.[7]

The following morning, Mrs. Murray formally appealed to the Commission.[8] Simultaneously, she brought suit in district court seeking a stay of her discharge pending the Commission's decision. The court, Judge Gasch presiding, issued a temporary restraining order until a hearing could be held on her motion for a preliminary injunction.[9]

At the hearing on Mrs. Murray's motion for a preliminary injunction, counsel for the government offered to produce Mr. Sanders' affidavit that, in making the decision to terminate Mrs. Murray, he had not considered the allegations regarding her service at DIA in whole or in part.[10] Judge Gasch, finding the proffered evidence unlikely on its face, insisted on Mr. Sanders' live testimony on this point.[11] Thereupon, the hearing was adjourned until Mr. Sanders would appear and the TRO was continued until the hearing could be completed.[12] Judge Gasch was later advised that the government refused to produce Mr. Sanders.[13] For this reason, the hearing on the preliminary injunction was never completed.

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[7] *Id.* at 8.

[8] *Id.* at 19-24.

[9] *Id.* at 33.

[10] *Id.* at 38.

[11] *Id.* at 41-42.

[12] *Id.* at 43.

[13] Petitioner's Brief on Petition for Writ of Certiorari, App. F., p. 42a.

The government appealed, contending that the court lacked jurisdiction to enjoin the discharge and that the court erred in requiring Mr. Sanders' evidence to be presented in the form of live testimony.

At oral argument before the court of appeals, the government advised the court that the Civil Service Commission had been instructed to withhold processing of Mrs. Murray's appeal in order to avoid mooting this case.

The court of appeals affirmed the district court's decision that it had jurisdiction to enjoin Mrs. Murray's discharge pending review by the Commission.[14] Noting that its jurisdictional holding was limited to "the propriety of the [District] Court's granting interim injunctive relief pending an administrative determination on the merits," 462 F.2d 871, 874, the court of appeals stressed that, since the hearing was never completed, neither the validity of the dismissal nor the question of irreparable harm had been litigated in the district court. The court of appeals then stated:

> "Without intimating in any manner which way [these issues] should be decided, it is probable that only in a small percentage of cases would the complaining employee be able to establish the grounds for a temporary injunction—assuming that executive agencies conscientiously follow their own rules of due process. But here the complaining employee alleges that the agency has violated its own rules, has not accorded her the required hearing, and is in the process of discharging her unlawfully. She does not ask the trial court to rule on the *merits* of her discharge; the agency may have ample grounds, but it must follow procedural due proc-

[14] The court of appeals also approved of Judge Gasch's right, under Rule 43(e), F. R. Civ. P., to require oral testimony from Mr. Sanders in lieu of the proffered affidavit. 462 F.2d 871, 878-79. The court was apparently unanimous on this aspect of the case, and petitioner has abandoned the issue before this Court.

ess to establish them. To hold that the District Court has no jurisdiction on the basis of these allegations to grant the temporary relief requested, would be tantamount to holding that the District Court *never* would have jurisdiction." *Id.* at 879-80.

Summary of Argument

The procedural posture of this case is somewhat unusual. The record of the hearing on Mrs. Murray's motion for a Temporary Restraining Order, issued on June 4, 1971, is not before the Court; nor did the government seek appellate review of that Order. The Temporary Restraining Order was continued until a hearing on Mrs. Murray's motion for Preliminary Injunction could be completed. That hearing was never completed because the government refused to produce Mr. Sanders for live testimony. The government has abandoned before this Court any claim that it was entitled to withhold Mr. Sanders' testimony.

In sum, the government aborted the hearing below before it could be completed. As a result, Mrs. Murray was never afforded an opportunity to face—or Judge Gasch to pass on—the question of whether the threatened injury to her is sufficiently unique to merit the extraordinary relief sought. The court of appeals repeatedly stated that Mrs. Murray will have to meet this burden when the hearing resumes.

Under these circumstances, the government's cavalier characterization of this case as "routine" is premature on the present record. If it should appear at the hearing that Mrs. Murray's case is truly routine, Judge Gasch will rule accordingly. At issue here is whether *any* possible showing on her part could justify the relief sought.

1. As the court of appeals held, this case does not involve the doctrine of exhaustion of administrative remedies. That

doctrine, as petitioner now concedes, acts to preserve the agency's right to make a final determination on the merits and does not prevent the issuance of injunctive relief which merely preserves the *status quo* pending administrative appeal. Petitioner's general exposition on the limited role of the courts in civil service appeals is, therefore, irrelevant.

2. Nor does this case involve the related issues of irreparable harm or the underlying merits of respondent's claim. Petitioner's refusal to proceed with the hearing leaves these questions to the trial court.

3. Petitioner's fundamental contention—that no federal court can ever enjoin a civil service discharge in order to preserve its ultimate jurisdiction—is invalid. The federal courts have repeatedly invoked their traditional equity powers, as embodied in the All Writs Act, 28 U.S.C. 1651(a), to preserve the *status quo* pending administrative appeal. This practice was endorsed by this Court in *F.T.C.* v. *Dean Foods*, 384 U.S. 597 (1966). There are, in fact, at least two cases in which injunctions were issued against the discharge of a federal employee. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D. N.Y. 1950).

4. There is nothing in the "administrative scheme" of the civil service laws to preclude such use of the All Writs Act. In issuing the injunction in this case, the courts below were not challenging any part of the civil service law; rather, they were attempting to preserve the *status quo*, so that the Civil Service Commission might effectively uphold a specific procedural requirement of that law.

Moreover, in view of the repeated statements of this and other courts that the All Writs Act cannot be curtailed by mere implication, the narrow legislative histories of the Back Pay Acts of 1948 and 1966 cannot be said to preclude the type of relief granted in this case. There is, in fact, clear evidence that Congress never intended those Acts to preclude other forms of relief.

5. Petitioner's reliance on the Attorney General's 1948 view that Section 10(d) of the Administrative Procedure Act, 5 U.S.C. § 705, does not, in and of itself, vest courts with injunctive power until an appeal is pending may well be misplaced. But even assuming, *arguendo*, that that interpretation is correct, the injunctive power of courts reviewing administrative decisions as provided by Section 10(d) is certainly consistent with, and at times may be dependent upon, prior interim relief as granted in this case under the All Writs Act.

Such interim relief is also consistent with the 1972 extension of Title VII of the 1964 Civil Rights Act to federal employees. 42 U.S.C. § 2000e-16. Indeed, if one accepts petitioner's theory that no federal court can ever grant interlocutory relief in a federal employee discharge case, he is forced to the conclusion that, despite the clear intent of the recent amendment to Title VII, federal employees have fewer rights under that Act than private employees.

6. Given the stringent requirements for any injunctive relief, the remedy at issue here will probably be invoked very sparingly. However, the fundamental jurisdictional question in this case is of critical importance for the general administration of the civil service laws and for the jurisdictional integrity of the federal courts.

ARGUMENT

I.

As the Court of Appeals emphasized, this case involves neither a determination on the merits nor an adverse construction of civil service law, and the precedents cited by petitioner regarding judicial deference toward civil service determination are, therefore, irrelevant.

Though petitioner at last agrees that, "this case does not present an exhaustion question in the traditional context of deferring judicial consideration of a matter to be decided by an administrative agency" (Petitioner's Brief, p. 19), it continues to argue that the judiciary has limited jurisdiction over civil service determinations which may not be invoked until the employee has exhausted his administrative appeals. Petitioner's Brief, pp. 10-13, 17, 18-20. While these general observations are correct, it is equally clear, as the court of appeals held, that such considerations are not relevant where the employee is seeking not a determination on the merits but only a temporary stay pending administrative and judicial review. As the court stated:

> "It is important to specify exactly what legal issue confronts us. *We are here concerned with the propriety of the court's granting interim injunctive relief pending an administrative determination on the merits,* when there is no statutory provision specifically authorizing such relief. In the past this issue has been confused with the related, but quite distinct, issue of the necessity for the exhaustion of administrative remedies before an adjudication on the merits may be obtained in a court. This error stems from the failure to recog-

nize that *what is sought in actions such as the case at bar is not a determination on the merits that will be binding upon the administrative agency before that agency has had its chance to complete its procedures for such a determination, but is simply an interim form of relief to prevent irreparable damage to the parties or to the public interest while the final outcome of the administrative determination is uncertain. Such interim relief is not the interference with agency actions which the exhaustion of remedies doctrine seeks to prevent, but instead often serves as an aid to the administrative process, since by preserving the status quo it ensures that the final administrative determination will not be undermined or rendered ineffective by by hasty or incorrect procedures at an earlier stage."* 462 F.2d 871, 874-75 (Emphasis supplied).

For a further discussion of this distinction, see *L. Jaffe, Judicial Control of Administrative Action* 669-71 (1965); Comment, *Interim Injunctive Relief Pending Administrative Determination*, 49 *Col. L. Rev.* 1124, 1127-28 (1949).

However, while it is clear that the exhaustion doctrine is not applicable in this case, petitioner's argument by analogy (Petitioner's Brief, p. 20) does merit some consideration. First, it must be remembered that the court of appeals found that Mrs. Murray has conscientiously pursued her administrative appeal. 462 F.2d 871, 873. In this regard, the court stressed that the Civil Service Commission had no power to stay her discharge. *Id.* This is not, therefore, a case where an employee has gone to the courts for relief which the agency could have granted but refused to do so. Respondent pursued her administrative remedies as fast and as far as she could; and she will continue to do so under a temporary court order that merely preserves the *status quo* pending her administrative appeal.

Similarly, it was the government, and not Mrs. Murray, who created whatever delay has ensued in this case. Indeed, Judge Gasch did not even issue his opinion until he was informed that the government had no intention of either producing the one witness who could clarify the reasons for the discharge or granting Mrs. Murray her rights under the civil service regulations. Given such a record, it seems rather incongruous for petitioner to suggest that an affirmance in this case will necessarily prolong civil service determinations.

Finally, it should be noted that the very precedent cited by petitioner to support its exhaustion theory, states that,

> "To be sure, as with most general rules of decision, there are exceptions. Thus, if the prescribed administrative procedure is clearly shown to be inadequate to prevent irreparable injury, or when there is a clear and unambiguous statutory violation, then a court need not defer decision until the conclusion of the administrative inquiry. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752 at 773, 67 S. Ct. 1493; *Fitzpatrick* v. *Snyder,* 220 F.2d 522, 525 (1st Cir. 1955), *cert. denied* 349 U.S. 946, 75 S. Ct. 875, 99 L. Ed. 1272; *Wettre* v. *Hague,* 168 F.2d 825 (1st Cir. 1952). *Shargel* v. *Hollis,* 120 F. Supp. 814 (S.D.N.Y. 1954); *Reeber* v. *Rossell,* 91 F. Supp. 108 (S.D.N.Y. 1950)."

American Federation of Government Employees v. *Resor,* 442 F.2d 993, 994-95 (3rd Cir. 1971).

It seems strange to argue that where irreparable injury is likely a court may ignore the administrative process entirely and decide the case immediately, but that it may not —when faced with the same probability of irreparable harm —take the less intrusive action of preserving the *status quo* pending an administrative hearing on the merits. Thus, as

a matter of law, policy and logical consistency, the exhaustion doctrine in no way bars judicial preservation of the *status quo* pending an administrative appeal.

II.

As the Court of Appeals also emphasized, this case does not turn on either the question of irreparable injury or the validity of respondent's underlying claim.

The government's refusal to produce Mr. Sanders precludes it from raising the related issues of irreparable harm or the underlying merits of respondent's claim. As the court of appeals emphasized, these questions remain for the trial court to determine. 462 F.2d 871, 877-78, 879-80. By refusing to proceed with the hearing, the government has conceded the likelihood of both ultimate success on the merits and irreparable harm.[13] Such questions are not, therefore, before this Court. The only question here is the jurisdiction of the federal courts to enjoin a civil service discharge, *assuming that the employee has shown he is likely to prevail on the merits and to suffer irreparable injury.*

[13] Respondent has, however, consistently offered to show unique circumstances proving irreparable harm. Reply Brief for Jeanne M. Murray, p. 7 n.4.

III.

Petitioner's principal contention—that no court can ever enjoin a civil service discharge to preserve its jurisdiction—is incorrect.

Courts of equity have granted injunctive relief maintaining the *status quo* pending agency determinations since the inception of the modern administrative process. In early cases, involving administrative determinations of land titles, injunctions were uniformly issued to restrain waste pending the agency's decision.[16] With the growth and development of the administrative process, injunctive relief has been granted in a variety of contexts at the instance of both aggrieved individuals[17] and the agencies themselves.[18]

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[16] *Olive Land & Development Co.* v. *Olmstead*, 103 F. 568 (C. C. S.D. Cal. 1900); *Northern Pacific Co.* v. *Soderburg*, 86 F. 49 (C. C. N.D. Wash. 1898); *Elliott* v. *Rich*, 24 N.M. 52, 172 P. 194 (1918).

[17] *Smith* v. *Resor*, 406 F.2d 141 (2d Cir. 1969) [Induction of army reservist stayed pending military review proceedings]; *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965) [Soldier's discharge enjoined pending action by Discharge Review Board]; *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F.2d 775 (2d Cir. 1948) [Rate reduction enjoined pending decision by Maritime Commission]; *Crown Zellerbach Corp.* v. *Wirtz*, 281 F. Supp. 337 (D.D.C. 1968) [Secretary of Labor enjoined from barring manufacturer from government contracts pending an administrative hearing on employment discrimination charges]; *Pennsylvania Motor Truck Ass'n.* v. *Port of Philadelphia Marine Terminal Assn.*, 183 F. Supp. 910 (E.D. Pa. 1960) [Pier operator's truck loading practice enjoined pending decision by Maritime Board); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950) [Discharge of federal employee enjoined pending review by Civil Service Commission]; *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D.N.Y. 1948), *appeal dismissed*, 336 U.S. 941 (1949) [Implementation of rate agreements enjoined pending review by Maritime Commission]; see generally, Comment, *Interim Injunctive Relief Pending Administration Determination*, 49 *Colum. L. Rev.* 1124 (1949); Note, *Human Relations Commissions*, 74 Yale L. J. 1171, 1199 n.141 (1965); L. Jaffe, *Judicial Control of Administrative Action*, pp. 662-86 (1965).

[18] *F.T.C.* v. *Dean Foods Co.*, 384 U.S. 597 (1966) [Merger enjoined pending FTC decision]; *Public Utilities Commission* v.

In *F.T.C.* v. *Dean Foods*, 384 U.S. 597 (1966), this Court explicitly upheld this practice of preserving the *status quo* pending administrative review.[19] Rejecting arguments that Congress had *implicitly* curtailed the court's traditional equitable powers embodied in the All Writs Act (28 U.S.C. § 1651(a)), this Court held that without some *explicit* congressional enactment to the contrary, the courts retain their authority to issue appropriate injunctions to preserve the jurisdiction of both the administrative agencies and the courts of review. *Id.* at p. 608.

Such authority has, in fact, been invoked at least twice before to stay the discharge of a federal employee. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950) (Kaufman, J.), *Cf. Group* v. *Finletter*, 108 F. Supp. 327 (D.D.C. 1952) (enjoining the demotion of a federal employee pending both administrative and judicial review). And only recently, the Fifth Circuit held that the courts can grant such injunctive relief in the related context of a private employee appealing a discharge to the Equal Employment Opportunities Commission. *Drew* v. *Liberty Mutual Insurance Co.*, CCH Emp. Prac. Guide ¶ 8652 (5th Cir. June 4, 1973).

Petitioner ignores *Reeber* completely. This is particularly unfortunate in view of the government's contention that sixteen years after *Reeber*, Congress—without any

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Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954) [Rate increase enjoined pending decision by P.U.C.]; *Board of Governors, etc.* v. *Transamerica Corp.*, 184 F.2d 311 (9th Cir. 1950), *cert. den.* 340 U.S. 883 (1950) [Bank merger enjoined to preserve jurisdiction of the Federal Reserve Board].

[19] *See also, Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963); *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942).

mention of it or any other treatment of this issue—eliminated the courts' injunctive powers in civil service cases.[20]

Petitioner attempts to avoid *Schwartz* by arguing that a different circuit has held that the agency involved—the Army Board for Correction of Military Records—is not part of the administrative process. Petitioner's Brief, p. 25 n.8; *Ogden* v. *Zuckert*, 298 F.2d 312 (D.C. Cir. 1961). *But see, Sohm* v. *Fowler*, 365 F.2d 915 (D.C. Cir. 1966) (limiting *Ogden*); *Nelson* v. *Miller*, 373 F.2d 474, 479-81 (3rd Cir. 1967), *cert. denied* 387 U.S. 924 (1967) [stating that *Schwartz* was correct in holding that a court could enjoin a discharge under certain circumstances prior to review by the military boards, but that despite *Ogden*, even a court granting interim relief should give the military boards the first chance to pass on the merits of the dispute].

However, as the court of appeals held, such a distinction is merely another attempt to inject the inapplicable exhaustion doctrine into this case:

". . . Whatever the correctness of the *Ogden* court majority (see the closely reasoned dissent by the then

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[20] In his dissent, Judge Robb attempted to distinguish *Reeber* on the grounds that the Back Pay Act of 1948 would not have applied to the plaintiffs in that case, 462 F.2d 871, 882 n.1. In view of the fact that the plaintiffs in *Reeber* were disabled veterans (91 F. Supp. 108, 110), Judge Robb's conclusion that the Act would not apply seems highly questionable. See 62 Stat. 354 (1948); 39 Comp. Gen. 639, 641 (March 14, 1960); *U.S. Code, Cong. & Adm. News* (1966), p. 2098 (reprinting the Senate Report on 1966 Back Pay Act which states that the 1948 Act, in conjunction with the Veteran's Preference Act of 1944 authorized back pay awards to veterans separated in reductions in force).

However, even assuming *arguendo* that the Act did not apply to the plaintiffs in *Reeber*, the availability of such relief goes only to the question of irreparable harm and not to the courts' basic jurisdiction to grant injunctive relief. In this regard, it is instructive to note that Judge Kaufman—writing only two years after the 1948 Act—never mentioned the possibility that the Act deprived him of jurisdiction.

Judge Burger), the holding in that case has no application to our reliance on *Schwartz*.

The Ninth Circuit was concerned in *Schwartz* solely with the question of the propriety of granting interim relief. The opinion did *not* pass *either* on the merits *or* on the application or nonapplication of the doctrine of exhaustion of administrative remedies; it *assumed* that the doctrine did apply, and simply granted interim relief pending the final administrative determination. In *Ogden*, on the other hand, this court held that the exhaustion doctrine *did not apply*, because the matter had achieved sufficient administrative finality . . . . In other words, in *Ogden*, unlike *Schwartz*, the question *was* the application or nonapplication of the doctrine of the exhaustion of administrative remedies.

Murray v. *Kunzig* is a case like *Schwartz* v. *Covington*. We are not concerned with the application or nonapplication of the doctrine of exhaustion of administrative remedies, but simply with the propriety of the District Court's exercise of its traditional equity powers to grant interim relief." 462 F.2d 871, 885. (Emphasis in original.) *Accord: Nelson* v. *Miller*, 373 F.2d 474, 479-81 (3rd Cir. 1967), *cert. den.* 387 U.S. 924 (1967).

Indeed, as the court of appeals found, public employee discharges may well force the courts to act in order to preserve their jurisdiction. They must first insure that the employee will be able to invoke the primary jurisdiction of the Civil Service Commission. Preserving the effectiveness of such initial administrative review was, of course, the basis of this Court's opinion in *Dean Foods*. 384 U.S. 597, 603-605 (1966).

The government seeks to distinguish *Dean Foods* on the theory that it "reaffirmed the courts of appeals' power under the All Writs Act to issue injunctions 'in aid of their respective jurisdictions.'" (Pet. Br., at 28) The Act

is by no means confined to courts of appeals. Rather, it happened that a court of appeals is the initial judicial forum for review of actions by the Federal Trade Commission. 15 U.S.C. § 21(c). In this case, initial judicial review is clearly committed to the district courts.

The type of injunction at issue here preserves the potential jurisdiction of any court which has authority to review the administrative determination. This Court has repeatedly held that such relief may be granted prior to judicial appeal. *F.T.C.* v. *Dean Foods,* 384 U.S. 597, 603-04 (1966); *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21, 25 (1943); *Ex Parte United States,* 287 U.S. 241, 246 (1932); *McClellan* v. *Carland,* 217 U.S. 268, 280 (1910). And as petitioner concedes, it is now beyond question that the federal courts do have ultimate jurisdiction over civil service appeals. Petitioner's Brief, p. 17. *See also,* 5 U.S.C. § 702; *Lodge 1858, Am. Fed. of Gov. Emp.* v. *Paine,* 436 F.2d 882, 893, n.69 (D.C. Cir. 1970); *Charlton* v. *United States,* 412 F.2d 390, 394 (3rd Cir. 1969); Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions,* 57 *Corn. L. Rev.* 178 (1971).

Finally, while it must be remembered that neither the question of irreparable injury nor of the necessity for an injunction to preserve jurisdiction[21] are before this Court, it should be noted that the same Back Pay Act emphasized by petitioner suggests a further reason why the courts may

[21] In its brief, petitoner now contends that the district court erred in finding that an injunction was necessary to preserve its jurisdiction, and that therefore the injunction was not authorized by the All Writs Act. Pet. Brief p. 29. Given the facts that the government offered absolutely no assurance that respondent's administrative appeal would be processed promptly and that it never permitted respondent to prove her claim that she would be irreparably harmed in the indeterminate interim, petitioner's attempt to

be forced to enjoin discharges in order to insure both administrative and judicial review. If the employee is discharged pending appeal and is unable to obtain interim employment—something which seems likely following an unjustified discharge—he may find it so difficult to provide for himself and his family that he will be unable to pursue his administrative and legal remedies. Thus in some instances, the Act will make administrative and judicial appeal worthless. In that event, both sound judicial and personnel administration suggest that, *assuming* proof of a likelihood of irreparable harm and of success on the merits, civil service discharges are an appropriate context for exercise of the preservation power embodied in the All Writs Act.

Such cases will be, as the court of appeals emphasized, quite rare. The traditional equitable requirements for interim relief[22] serve as an extremely effective screen. The petitioner without a strong case that his discharge was unlawful must be dismissed out of hand. Those unable to show unique and irreparable injury are also quickly out of court. In cases where the government has a compelling

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raise this factual question at this late stage is questionable on its face.

On the law, the government contends that since the court could have subsequently ordered reinstatement and back pay, the "immediate discharge of respondent would in no way limit the court's authority fully to review her discharge." *Id.* This conclusion is by no means compelled. Unless respondent is in a position to pursue her administrative and legal appeals, no court will ever hear her case. Moreover, a vital part of any court's jurisdiction is the power to frame a fully effective order following its decision. *See, Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923). The very concept of irreparable harm assumes that in certain exceptional cases, delayed relief will not be fully effective.

[22] *See e.g., Virginia Petroleum Jobbers Assn.* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958).

interest in immediate dismissal, such as those involving security matters,[23] relief must also be denied.[24] Experience in the District of Columbia since this case was decided confirms that the traditional equitable tests have been extremely effective in avoiding the non-meritorious claims. A holding that the courts lack jurisdiction to issue interim relief on any possible state of facts would serve no purpose other than to bar the handful of highly meritorious cases.

IV.

There is nothing in the "administrative scheme" which precludes such use of the All Writs Act.

Petitioner's contention that the "administrative scheme" of the civil service laws implicitly precludes judicial action under the All Writs Act ignores the clear doctrine of this and other courts that such jurisdiction may be curtailed *only* by an explicit enactment of Congress. *F.T.C.* v. *Dean Foods*, 384 U.S. 597, 608-12 (1966); *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 11-15 (1942); *Virginia Petroleum Jobbers Ass'n.* v. *F.P.C.*, 259 F.2d 921, 924 (D.C. Cir. 1958).

At the outset, it must be emphasized that Mrs. Murray is in no way challenging existing civil service law or regulations. Petitioner's summary on the limited rights of probationary employees (Petitioner's Brief, pp. 15-17) is simply irrelevant, since, as petitioner concedes, if the discharge at issue

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[23] *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961).

[24] *See, Scarpa* v. *Smith*, 294 F. Supp. 13 (S.D.N.Y. 1968).

> "was in fact based in whole or in part on conduct occurring prior to her appointment by the General Services Administration, [respondent] was entitled under 5 C.F.R. 315.805 to additional procedural rights. Those rights include advance notice of the proposed action against her, an opportunity to reply in writing and with supporting affidavits, and notice of an adverse agency decision on or before its effective date." Petitioner's Brief, p. 4.

Since the government was unwilling to dispute Mrs. Murray's claim that her discharge was in fact based on such prior conduct, the two courts below had to assume that far from contradicting the civil service law, they were upholding it.

Petitioner is thus forced to contend that Congress, in enacting the Back Pay Acts of 1948 and 1966, intended to preclude interim relief under the All Writs Act. Given the clear disapproval of repeals by implication noted above, it should first be stressed that not one word in these acts suggests any limitation of the courts' jurisdiction. 5 U.S.C. § 5596. By contrast, it is clear that when Congress does desire to curtail the injunctive powers of the courts, it is quite capable of expressing that intent in explicit legislation.[25]

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[25] *See, e.g.*, 15 U.S.C. § 634(b)(1) [Providing that no injunction may be issued against the administrator of the Small Business Administration]; 28 U.S.C. § 1341 [Prohibiting injunctions in state tax cases where "a plain, speedy and efficient remedy may be had in the courts of such state"]; 28 U.S.C. § 1342 [Prohibiting injunctions in certain state cases]; 28 U.S.C. § 2281 [Limiting injunctions against the enforcement of state statutes to three-judge courts]; 28 U.S.C. § 2282 [Limiting injunctions against the enforcement of federal statutes to three-judge courts]; 28 U.S.C. § 2283 [Limiting injunctions of state court proceedings to certain circumstances including "where necessary in aid of [the federal court's] jurisdiction"].

In both *Scripps-Howard* and *Dean Foods* this Court noted rather more substantial political histories regarding the proper means of enforcing the F.C.C. and F.T.C. Acts, and held, however, that congressional silences, and inferences derived from them, could not curtail judicial action under the All Writs Act. *Scripps-Howard* v. *F.C.C.*, 316 U.S. 4, 11-13 (1942); *F.T.C.* v. *Dean Foods*, 384 U.S. 597, 600. See also, *id.* at 612-13 (Fortas, J. dissenting).

By contrast, petitioner is unable to cite any consideration of the judicial role in civil service determinations in the history of the Back Pay Acts. Indeed that history is replete with statements that the two acts were nothing more than authorizations of back pay for wrongfully discharged employees.

The Senate Report accompanying the original version of the 1948 Act is representative of this narrow legislative focus. It states that the inability of the Civil Service Commission to award back pay was a "loophole" that needed correction, and that the bill in question, "merely acts to afford the members of the classified service the amount of compensation they would have received if the improper action had not been taken against them. . . ." S. Rep. No. 414, 80th Cong., 1st Sess., p. 1.

Similarly, the House Report accompanying the version ultimately enacted into law stated simply:

> "The purpose of the proposed legislation is to provide payment of compensation covering periods of separation to employees improperly removed or suspended without pay from the Federal service . . . ." H. Rep. No. 1436, 80th Cong., 2nd Sess., p. 3.

In neither report, nor in any of the interpretations from the Civil Service Commission and Comptroller General

appended to them, nor in any of the floor debate is there any suggestion that such *additional* relief was intended to preclude all other legislative, administrative, or judicial remedies. Similarly, in extending the Act to probationary employees in 1966, the House Report made it clear that the back pay provisions were merely triggered by—and in no way displaced—the normal appeals process:

> "H.R. 1647 is basically perfecting legislation. It does not create any new rights of tenure, review, or appeal. It is concerned only with adjustments in salary and other benefits that are appropriate in consequence of corrective actions that may now be taken. It requires only that, when an erroneous action has been corrected by the appropriate authority, the employee will, for pay and other employment benefit purposes, be deemed to have rendered service at his proper grade during the period . . . ." H. Rep. No. 32, 89th Cong., 1st Session, p. 2.

This view was in large part based on the interpretation given to the Act by the Chairman of the Civil Service Commission:

> "Essentially, the bill is perfecting legislation. It would fill in gaps in the backpay protection currently afforded employees in various situations. It would not add any rights of tenure, review, or appeal, *nor would it restrict or define the nature of corrective actions* . . . ."
>
> "The bill adequately safeguards the interest of agencies and employees. It does not require agencies to review actions. *It does not diminish any right or benefit employees now have.*" *Id.*, p. 10 [Emphasis added]

At the hearings on the 1966 Act, Congressman Beckworth, the author of the bill, further confirmed this narrow view:

"This bill is basically perfecting legislation, and creates no new rights of employment tenure, review or appeal. It merely authorizes adjustments in salaries and other benefits that are warranted in consequence of corrective personnel actions that may be taken under existing law . . . ." *Hearing on H.R. 1647 before the Subcommittee on Civil Service of the Senate Committee on Post Office and Civil Service*, 89th Cong., 2nd Sess. (1966), p. 2.

Finally, testimony by the Chairman of the Civil Service Commission on the 1962 predecessor of the 1966 Act demonstrates that this narrow interpretation was widely and consistently advanced:

"[The 1962 bill] is concerned only with the backpay consequence of corrective actions that may now be taken. *It has nothing to do with the substance of appeal rights, the structure of the appeals process, or the precise nature of corrective actions.* It requires only that when an erroneous action has been corrected by the appropriate authority, the employee be given backpay. *This bill enters the picture only when it has finally been decided officially, and through whatever means may be authorized now or in the future, that a wrong has been done that should be set right.*" *Hearing on H.R. 10685 before the House Committee on Post Office and Civil Service*, 87th Cong., 2nd Sess., (1962), p. 12. [Emphasis added]

In view of this insistence that the Back Pay Acts have no effect on the "substance", "structure", or "precise nature" of the corrective process, the brief remark by Senator Langer cited by petitioner can hardly be regarded as a statement of congressional intent to limit the traditional powers of the judiciary. Similarly, the selected portion of the 1966 House Report to the effect that the Act constitutes a means by which wrongfully discharged employees can be "made

whole," should be viewed as but a general theory of restitution—a theory which has always allowed injunctive relief when exceptional circumstances warrant. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 506-07 (1959); *Pennsylvania* v. *The Wheeling & Belmont Bridge Co.*, 13 How. 518, 561 (1851).

In sum, it is clear that Congress had no intention of precluding the jurisdiction involved in this case when it enacted the Back Pay Acts. Given this absence of legislative intent —*and* of any explicit enactment—to curtail the traditional authority of the courts to preserve their jurisdiction, that authority as embodied in the All Writs Act must be upheld.

V.

While not necessarily requiring the jurisdiction at issue in this case, both the Administrative Procedure Act and the 1972 Amendments to Title VII of the 1964 Civil Rights Act are consistent with, and may at times be dependent on, such interim injunctive relief.

Petitioner's reliance on the Attorney General's belief that Section 10(d) of the Administrative Procedure Act, 5 U.S.C. § 705, does not in and of itself confer injunctive power on a court until an appeal has been taken may well be misplaced in light of later judicial interpretations[26] and

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[26] *Compare, Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383 (1938) [cited by the Attorney General for its narrow view that the preservation power of the All Writs Act, which he apparently found analogous to the injunctive power contained in the APA, was dependent on an actual appeal], *with Chandler* v. *Judicial Council*, 398 U.S. 74, 112 (1970) (Harlan, J., concurring in denial of writ of prohibition and/or mandamus); *F.T.C.* v. *Dean Foods*, 384 U.S. 597, 603-04 (1966); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) [All stating that the preservation power in the All Writs Act is not dependent on an

the fact that the only case cited by the Attorney General was concerned primarily with the abuse of interlocutory appeals of mere procedural rulings. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-85 (1938).

However, assuming *arguendo* that the APA does not duplicate the jurisdiction properly exercised in this case under the All Writs Act, it is nevertheless clear that the injunctive power of a court formally reviewing an agency determination is consistent with, and at times may be dependent upon, prior injunctive relief to maintain the status quo pending initial administrative action. This is, in fact, the major premise of this Court in *Dean Foods*, 384 U.S. 597, 603-04 (1966).

Similarly, the jurisdiction exercised in this case is consistent with, and may at times prove decisive in effectuating, the 1972 extension of Title VII of the 1964 Civil Rights Act to federal employees. As indicated by the incorporation by reference which applies the same procedures to private and federal employee discrimination suits, 42 U.S.C. § 2000(e)-16(d) (1972), and by the legislative history of the 1972 Amendment, H. Rep. No. 92-238, Congress clearly intended to create parallel remedies for employment discrimination in the public and private sectors.

The government states:

> "We contend here only that the district courts may not enjoin discharge of *federal* employees pending administrative review of their discharges. Whether a

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actual appeal but may be exercised to preserve a court's potential jurisdiction.]

In short, Petitioner's interpretation of Section 10(d) amounts to little more than a reiteration of its exhaustion theory.

private employer may be enjoined under certain circumstances from discharging an employee pending the processing by an administrative agency of a complaint challenging the discharge is, of course, a different question." Petitioner's Brief, p. 20, n.5.

This is apparently an attempt to distinguish, without citing, *Drew* v. *Liberty Mutual Insurance Co.*, CCH Emp. Prac. Guide ¶ 8652 (5th Cir., June 4, 1973), which approves the use of injunctive relief pending a review by the EEOC of a private discrimination complaint. It is difficult to see why, in light of the congressional intention to provide parallel remedies, this should be so. It is also difficult to see how a back pay award constitutes an exclusive remedy when granted by the Civil Service Commission to a federal employee discharged because of "race, color, religion, sex, or national origin," but is not considered exclusive when granted by the EEOC to a similarly aggrieved private employee.[27]

We are not, of course, suggesting that this case is governed by either Title VII or by previous similar laws and regulations. *See,* 5 U.S.C. § 7151; 5 C.F.R. 315.806. But it is clear that if the government is allowed to violate one of the few specific safeguards granted probationary employees (that is, the right to notice of charges based on prior conduct and the opportunity to reply to them, 5 C.F.R. 315.805), without a possibility of judicial action maintaining the *status quo* pending appeal, then it may also violate the prohibitions of racial or sexual discrimination on the same theory that the Back Pay Act precludes all judicial intervention.

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[27] *Compare* 5 U.S.C. § 5596(b) [Providing for back pay and reinstatement for aggrieved federal employees] *with* 42 U.S.C. § 2000e-5(g) (1964), as amended, 1972 [Providing for back pay and reinstatement for aggrieved private employees].

The government's attempted distinction of *Drew,* supported entirely by a breezy "of course," comes down to a bald statement that federal employees are in a position inferior to their private counterparts with regard to the same legislatively-created rights. The long history of congressional concern with protecting the rights of government employees argues to the contrary. By contrast, the view of the All Writs Act advanced by the court of appeals in Mrs. Murray's case is consistent with the clear congressional intent to extend to federal workers the same protection from job discrimination given to private employees under Title VII.

VI.

While this case will undoubtedly be applied sparingly because of the stringent requirements of injunctive relief, the underlying jurisdictional question at issue here is of critical importance.

The court of appeals explicitly warned that the type of relief granted in this case is limited to exceptional circumstances. 462 F.2d 871, 877-78. The court stressed that an employee must fully satisfy the traditional requirements for extraordinary relief in a court of equity.

Given the limited nature of judicial review in civil service appeals, few courts will find even that the employee is likely to prevail on the merits unless—as in this case—the government appears to have violated one of its own regulations *and* refuses to offer any testimony to rebut the *prima facie* case against it. Indeed, had the government produced its key witness, it might have persuaded Judge Gasch that Mrs. Murray's claim on the merits was not strong enough to qualify for injunctive relief, and the matter would have ended forthwith.

Similarly, the government will undoubtedly be able to refute most claims of irreparable injury by merely informing the court that the employee's appeal will be heard in the relatively near future. Here, of course, the government refused to process Mrs. Murray's administrative appeal. Moreover, even where the government delays the employee's appeal, trial courts will find a likelihood of irreparable harm only in certain exceptional cases. Again, it must be remembered that the probability of irreparable injury was never actually determined in this case.

It is not, therefore, surprising that the courts following this case have only rarely granted injunctive relief. Of the twelve suits cited in petitioner's brief for certiorari[28] seeking the relief granted here, ten were dismissed out of hand. In *American Federal of Government Employees* v. *Fletcher*, D. D.C. No. C.A. 1238-72, a T.R.O. was granted, but later vacated and a preliminary injunction was denied, the district court holding:

> "This is not the 'exceptional case' warranting issuance of a preliminary injunction, under the standard for interlocutory court intervention prescribed by the United States Court of Appeals for the District of Columbia Circuit in *Murray* v. *Kunzig* . . . ." *Id.*, Findings of Fact and Conclusions of Law, p. 7 (July 27, 1972).

Similarly, in *Settle* v. *Brown*, 345 F. Supp. 405 (S.D. Tex. 1972), the district court—after approving the jurisdictional holding at issue here—found that the employee had not met the likelihood of success burden and therefore was not entitled to injunctive relief.

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[28] Pet. Brief on Petition for Writ of Certiorari, p. 11.

Thus, of thirteen federal cases[29] brought on the strength of this case, there was only one, *Kirk* v. *Kleindienst*, D.D.C. No. C.A. 1397-72, in which relief was granted. Whether plaintiff there met the test of exceptional circumstances must remain unclear, since the court of appeals never had an opportunity to pass on it.[30]

Yet despite the fact that an affirmance in this case would not loose a flood of litigation, the underlying jurisdictional question at issue is of extreme importance. As noted above, if this Court accepts the government's theory that no court can ever enjoin the discharge of a federal employee pending administrative review, it will be eliminating the possibility of such judicial intervention even where the discharge is patently improper, the harm to the individual is extensive, and the necessity for injunctive relief to preserve the court's ultimate jurisdiction is manifest. It would, in short, be removing an important brake on what might otherwise become a personnel program of arbitrariness and undue delay.

A reversal in this case would also stand for the dangerous proposition that the equitable powers of the federal courts to preserve their jurisdiction can be eliminated by an attenuated interpretation of casual congressional remarks. Such a decision would cast grave doubt on the formerly clear rule that in matters of such importance only explicit

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[29] In *Jacob* v. *Burke*, 296 A.2d 456, 463-64 (1972), the Rhode Island Supreme Court cited the court of appeal's decision here with approval, but held that it was improper to grant injunctive relief without a showing of exceptional circumstances. The court further noted that the burden is on the party seeking such relief. *Id.* at 464.

[30] Following the withdrawal of the removal letter sent to Mr. Kirk, the court of appeals granted the government's motion to dismiss its own appeal of the district court's injunction. *Kirk* v. *Kleindienst*, (C.A. D.C. No. 72-1704, May 24, 1973).

legislative enactment will suffice. It would, in short, place the equitable powers of the federal courts and those who need their protection in serious jeopardy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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